



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**JOHN BEN SHEPPERD
ATTORNEY GENERAL**

August 13, 1954

Hon. C. H. Cavness
State Auditor
Capitol Station
Austin, Texas

Opinion No. MS-147

Re: Whether a note payable in monthly installments in such amounts as are realized from an oil-payment interest is a written evidence of indebtedness which bears a maturity date less than one year from date of issue to the extent of payments within the year.

Dear Mr. Cavness:

Your letter requesting our opinion relative to the captioned matter reads as follows:

"We are submitting herewith a copy of a note dated December 24, 1953, in the amount of \$3,000,000.00, payable on or before three (3) years from date in monthly installments from the proceeds of the sale of oil.

"It will be observed that there is no fixed minimum amount to be paid monthly and, since the amount of oil that may be produced each month and its value are unknown, we are unable to determine the portion of the note, if any, that will be paid or become due within one year from the date thereof and thus determine the amount subject to franchise tax for the tax year May 1, 1954 to April 30, 1955.

"It is requested that you advise this department as to how written evidences of indebtedness of this nature should be handled in order to comply with Article 7084, R.C.S."

The pertinent provisions of the note are as follows:

"On or before three (3) years from the date hereof, the undersigned, _____ a Texas corporation, promises to pay to The FIRST NATIONAL BANK OF CHICAGO, or its order, at the office of said Bank in the City of Chicago, Illinois, for value received Three Million

Dollars (\$3,000,000.00) together with interest until maturity at the rate of Three and One-Half Per Cent ($3\frac{1}{2}\%$) per annum payable monthly on the principal balance hereof remaining from time to time unpaid, on the 25th day of each month and at maturity and with interest after maturity (whether by acceleration or otherwise) at the rate of Seven Per Cent (7%) per annum until paid, all such payments of principal and interest to be made in lawful money of the United States.

"To secure the payment of this note, the undersigned has executed and delivered to said payee an Oil Payment Mortgage and Assignment, bearing even date herewith, covering an oil-payment interest payable out of production from certain lands located in Winkler County, Texas.

"

"As provided in the Mortgage and Assignment above mentioned, this note, as to both principal and interest, is payable in monthly installments beginning in February, 1954, equal to the proceeds (less taxes in the nature of gross production or severance taxes) accruing to the undersigned maker hereof from the sale of oil produced during the preceding calendar month from the limited overriding royalty or oil-payment interest which is mortgaged to secure the payment hereof, such amounts to be applied as received first to the payment of interest on the principal hereof to the date of the application, and then to the reduction of the principal hereof."

Article 7084, Vernon's Civil Statutes, the franchise tax statute, provides in part, as follows:

"(1) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, or doing business in Texas, shall on or before May first of each year, pay in advance to the Secretary of State a franchise tax for the year following based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures (outstanding bonds, notes and debentures shall include all written evidences of indebtedness which bear a maturity date of

one (1) year or more from date of issue,
...)".

This note shows that a portion of the indebtedness will be due within a year following its execution, since it is provided that the monthly proceeds from an oil payment interest are to be applied to the payment of the note. Clearly these payments will fall due within the year. The difficulty which arises at this point results from the fact that the tax is payable in advance, and the amounts of the monthly payments may not be definitely determined until they fall due. This hinders accurate computation of the tax. Nevertheless, we think the statute does not require payment of the tax on the portion of the note which will mature within the year, even though the exact amount is uncertain at the time the tax becomes due. This is the construction which has been placed on the statute by the Secretary of State. In 39 Texas Jurisprudence 234 it is stated:

"The contemporaneous construction of an act by those who are charged with the duty of its enforcement . . . has much persuasive force and is entitled to great weight in determining the meaning of an ambiguous or doubtful provision."

Under these circumstances, we think the Secretary of State may determine administratively the method for computing the tax at the time of payment and for making the necessary adjustments in the amount of tax paid. If the method adopted adequately protects the State's interests and at the same time affords the taxpayer the advantage of the deduction for amounts falling due within the year, it should not be disturbed.

The Office of the Secretary of State has established the practice in cases of this type of permitting the taxpayer to estimate the amount it will pay under this type of arrangement within the year. This amount is deducted from the figure used in computing the franchise tax. At the end of the year the tax is recomputed, using the amount which actually became due on the note during the year in place of the estimated amount. If the taxpayer has underpaid he must pay the difference together with a 25% penalty (Art. 7091, V.C.S.). If he has overpaid he may not claim a refund, since there is no provision for return of money voluntarily paid to the State.

The above procedure has been followed by the Secretary of State with satisfactory results for a period of more than ten years. It is our opinion that the procedure is a proper method for the collection of the tax.

Hon. C. H. Cavness, page 4 (MS-147)

A note payable in monthly installments in such amounts as are realized from an oil-payment interest is a written evidence of indebtedness which bears a maturity date of less than one year from date of issue to the extent of the payments due during the year.

For the purpose of determining the amount of franchise tax payable under Article 7084, V.C.S., the procedure followed by the Secretary of State in permitting the taxpayer to estimate its payments on the note, and pay any tax deficiency with a penalty at the end of the year is a proper method of collecting the tax.

Yours very truly,

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